United States v. *El Paso Natural Gas Co.*, 376 U.S. 651.[1] In that case, this Court held the acquisition by El Paso Natural Gas Company ("El Paso"), a producer and supplier of natural gas, of its competitor, Pacific Northwest Pipeline Corporation ("Pacific Northwest"), violative of Section 7 of the Clayton Act (15 U.S.C. 18) and directed the district court to order Pacific Northwest's divestiture without delay (376 U.S. at 662). On remand, El Paso initially proposed a plan of divestiture under which Pacific Northwest's business would be transferred to "New Company," to be owned by El Paso's stockholders. The government strongly objected to this plan on the grounds, *inter alia*, that it did not assure the independence of New Company and that it did not make adequate provision for accommodating the responsibilities of the antitrust court and the Federal Power Commission. After extensive negotiations between the government and El Paso and a number of hearings before the district court, the parties agreed upon a decree satisfying the government's principal objections.[2]

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[1] Prior to this appeal, and to the formulation and entry of the final decree of divestiture, other direct appeals from orders of the district court denying intervention in the proceedings below were filed in this Court by Cascade Natural Gas Corporation and the People of the State of California (Nos. 79 and 82). Disposition of these appeals, which the United States has moved to dismiss, is still pending. Most of the arguments for dismissing the present appeal are developed at greater length in our motion to dismiss filed in those cases.

[2] The final decree—designed to establish "an independent gas pipeline company capable of providing future competition

The decree agreed upon by the United States and El Paso was filed on May 24, 1965, along with a stipulation providing, *inter alia*, that the decree may be entered after thirty days and that persons affected by the proposed decree should be allowed to present their views as *amici curiae*. Under the later pro-

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to El Paso and other natural gas pipeline companies" (J.S. App. 2-3)—insures complete independence and separation of ownership and management between El Paso and New Company. It requires El Paso, within three years after transferring to New Company specified properties, assets and related liabilities, to divest itself of all interests in the shares of New Company stock received in return for the transferred property (J.S. App. 5-6). El Paso is also restrained from having any person as an officer or director who is, at the same time, an officer, director, employee or stockholder of New Company, or who has in his immediate family the owner of more than one-tenth of one percent of New Company's capital stock (J.S. App. 8).

The decree also requires that an application be filed with the Federal Power Commission on behalf of New Company, requesting the issuance of a certificate of public convenience and necessity authorizing New Company to acquire, own and operate the properties to be received from El Paso (J.S. App. 4-5). The decree specifically indicates that it is not intended to impinge upon whatever jurisdiction the Commission may have under the Natural Gas Act with respect to New Company (J.S. App. 5) and thus insures that questions such as the sufficiency of reserves and the financial soundness of New Company will be considered by the Commission in its certification proceedings. We are advised that Federal Power Commission proceedings were commenced on July 23, 1965, when applications were filed by both El Paso and New Company (FPC Docket Nos. CP 66-27, 28, 29, 30).

In the decree, as reproduced by appellant (J.S. App. 2-10), the last word of the twelfth line on page 5, "the," should be followed by the words "Federal Power Commission on January 15, 1964." And the word "Decree" on the thirteenth line on that page should be preceded by the word "This."

vision, appellant, in a letter dated June 11, 1965, asked the court to reject the proposed decree on the ground that it would not establish a strong, independent gas pipeline company, capable of competing with El Paso and other natural gas pipeline companies, particularly in the California market. Appellant also filed a formal application to intervene.

After considering the views of the various *amici*, including appellant, the district court entered the stipulated decree on June 24, 1965. On the same day, the court heard argument on appellant's request for intervention and denied the application from the bench.

ARGUMENT

The district court's denial of intervention fully accords with the settled authority that, except under certain limited circumstances, third parties are not entitled to intervene in government antitrust cases. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683; *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137; *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518 (dismissing appeal); *Wometco Television & Theatre Co.* v. *United States*, 355 U.S. 40 (dismissing appeal); *United States* v. *ASCAP*, 341 F.2d 1003, 1008 (C.A. 2).

1. Appellant claims the right to intervene under Rule 24(a)(2), Fed. R. Civ. P., which authorizes intervention "when the representation of the applicant's interest by existing parties is or may be in-

adequate *and* the applicant is or may be bound by a judgment in the action" (emphasis added). Neither of these elements is present here. Appellant cannot establish that it will be "bound" by the decree merely by showing its "interest" in the divestiture proceedings (J.S. 7, 11, 17), which coincides with the public interest in creating New Company as a viable, independent corporation, capable of performing as a vigorous competitor. As this Court held in the *Sam Fox* case (366 U.S. at 689):

> We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it.

Nor is there merit in appellant's unsupported allegation that its interest was no longer adequately represented by the United States after the government entered into the stipulation with El Paso. Appellant makes no claim of bad faith or malfeasance on the part of the government. Its argument amounts to little more than an assertion that it could represent the public interest better than the United States. Answering a similar argument in the early antitrust case of *United States* v. *Northern Securities Co.*, 128 Fed. 808, 812 (S.D. Minn.), the court, in denying intervention, said:

> It [the United States] is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules,

> the petitioners cannot intrude into this litigation merely to protect the public interest * * * so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise. * * *

See also *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73, 76-77 (S.D.N.Y.); *United States* v. *ASCAP*, 11 F.R.D. 511, 513 (S.D.N.Y.); *United States* v. *Bearing Distributors Co.*, 18 F.R.D. 228 (W.D. Mo.).

2. Relying solely on its asserted "direct interest" in this matter (J.S. 17-18), appellant also claims a right to intervene under Rule 24(a)(3), Fed. R. Civ. P., which provides for intervention "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court." But this section has always been available only to persons having "an interest [in the property to be disposed of] known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal." 4 Moore, *Federal Practice* (2d ed.), ¶ 24.09[2]. Appellant makes no claim of a proprietary interest in the assets to be transferred to New Company. Nor does it show, as it must under Rule 24(a)(3), that the alleged adverse effect of the disposition is "imminent and onerous" rather than merely "speculative and * * * contingent on unknown fac-

tors." *Sutphen Estates, supra,* 342 U.S. at 22-23. There is no reason to believe that the decree will not accomplish its avowed purpose of establishing an independent and competitive New Company.

3. As we have shown, appellant's claim of injury from the decree agreed to by the government is too speculative and contingent to support a ruling that the court abused its discretion in denying permissive intervention under Rule 24(b), Fed. R. Civ. P. Moreover, appellant and other affected persons made clear as *amici* their views on the decree's merits in the proceedings below. Nothing would have been added by formally permitting appellant to intervene since "[t]he record here discloses that the parties produced all data they and the court thought was available on the issues in the case." *Allen Calculators, supra,* 322 U.S. at 142. "Where, as here, examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented, the action of the court denying intervention should not be reviewed" (*ibid.*). See also *Brotherhood of R. R. Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519, 524.

4. Although this appeal was taken only from the denial of intervention, appellant suggests that it may invoke this Court's "plenary power" to determine whether the mandate in *El Paso* has been complied with (J.S. 21-22). But since, as we have shown, appellant was properly denied intervention here, it is not a party to the case and thus has no standing to attack the divestiture decree.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683; *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137.

Respectfully submitted.

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